PP

v.

NAI BOON WAH

COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
ABDUL WAHAB PATAIL JCA
CLEMENT SKINNER JCA
[CRIMINAL APPEAL NO: B-05-159-2010]
23 JUNE 2011

CRIMINAL LAW: *Penal Code - Section 304(a) - Sentence - Concurrent or consecutive - Facts and circumstances of each case - Whether a proper case to apply exception to one transaction rule and totality principle - Whether sentences to run consecutively*

CRIMINAL PROCEDURE: *Sentence - Concurrent or consecutive - Facts and circumstances of each case - Whether a proper case to apply exception to one transaction rule and totality principle - Whether sentences to run consecutively*

The respondent was originally charged for two offences under s. 302 of the Penal Code. The Deputy Public Prosecutor then tendered alternative charges under s. 304(a) of the Penal Code to which the respondent pleaded guilty. The facts were that the respondent had stabbed the two deceased persons repeatedly with a knife. The first deceased had died while on the way to the hospital while the second deceased collapsed at the table where he was sitting. The whole incident was recorded on CCTV in the bistro where the attacks took place. The judge sentenced the respondent to sixteen years' imprisonment for each offence to take effect from the date of his arrest. The judge ordered the two terms of imprisonment to run concurrently because, *inter alia*, the two offences were committed in the course of a single transaction. The public prosecutor appealed in respect of the sentence. The issue that arose was whether the two terms of imprisonment should be made to run consecutively instead of concurrently.

Held (allowing the appeal)
Per Hasan Lah JCA delivering the judgment of the court:

(1) The two offences committed by the respondent were very serious as the respondent had caused serious injuries to both victims with a knife which resulted in their deaths. The

respondent had acted aggressively and when he went into the bistro he already had a knife with him. The first deceased was not armed and had been viciously attacked by the respondent while he was trying to escape. The respondent had pursued him and stabbed him. The respondent was not in any danger as there was no retaliation from the first deceased. With regard to the second deceased, there was also no provocation or retaliation by the second deceased, who had died almost instantaneously at the scene of the crime. (paras 16, 17 & 18)

(2) This was a proper case for the court to apply the exception to the one transaction rule and the totality principle in deciding to order the two terms of imprisonment to run consecutively. The two offences committed by the respondent were very serious and each punishable with imprisonment of up to 20 years. This case also involved two separate and distinct offences and two different victims. In this case a matter which attracted the application of the exception to the one transaction principle was the fact that the second killing resulted from merciless anger. The respondent had come back to finish off the second deceased after having dealt with the first deceased. (para 20)

(3) Consecutive sentences are necessary in order to discourage violent crime affecting the human body resulting in death as public interest is paramount. Had the learned judge given adequate consideration to the circumstances and facts of this case he would have ordered that the two sentences run consecutively. The learned judge had erred in not applying the exception to the one transaction rule and the totality principle to this case. Thus, the two sentences were ordered to run consecutively. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Responden pada asalnya dituduh untuk dua kesalahan di bawah s. 302 Kanun Keseksaan. Timbalan Pendakwa Raya kemudiannya mengemukakan pertuduhan pilihan di bawah s. 304(a) Kanun Keseksaan di mana responden mengaku bersalah. Faktanya adalah responden telah menikam kedua-dua simati beberapa kali dengan sebilah pisau. Simati pertama telah meninggal dunia dalam perjalanan ke hospital manakala simati kedua telah rebah di meja yang didudukinya. Keseluruhan insiden itu telah dirakamkan oleh

CCTV di dalam tempat makan di mana serangan itu berlaku. Hakim telah menjatuhkan hukuman penjara 16 tahun bagi setiap kesalahan ke atas responden berkuatkuasa dari tarikh penangkapan. Hakim memerintah hukuman pemenjaraan berjalan serentak atas sebab, antara lain, kedua-dua kesalahan tersebut dilakukan dalam satu transaksi. Pihak pendakwaan merayu terhadap hukuman itu. Isu yang berbangkit adalah sama ada hukuman pemenjaraan sepatutnya berjalan berturutan daripada serentak.

Diputuskan (membenarkan rayuan)
Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:

(1) Kedua-dua kesalahan yang dilakukan oleh responden adalah serius kerana responden telah menyebabkan kecederaan yang serius kepada kedua-dua mangsa dengan sebilah pisau yang telah menyebabkan kematian mereka. Responden telah bertindak secara agresif dan apabila beliau memasuki tempat makan itu beliau sudah mempunyai pisau dalam genggamannya. Simati pertama tidak bersenjata dan telah diserang dengan kejam sekali oleh responden semasa beliau cuba melarikan diri. Responden tidak berada dalam keadaan bahaya kerana tiada tindak balas dari simati yang pertama. Mengenai simati kedua, juga tidak terdapat sebarang provokasi atau tindakan balas oleh simati kedua, yang telah meninggal dunia hampir dengan serta merta di tempat kejadian.

(2) Ini adalah kes yang sesuai untuk mahkamah memakai pengecualian kepada rukun satu transaksi dan prinsip keseluruhan dalam memutuskan dua hukuman pemenjaraan untuk dijalankan berturutan. Kedua-dua kesalahan yang telah dilakukan oleh responden adalah serius dan setiap satu boleh dihukum dengan 20 tahun penjara. Kes ini juga melibatkan dua kesalahan yang berasingan dan berbeza dengan dua mangsa yang berlainan. Di dalam kes ini perkara yang menarik pemakaian pengecualian kepada prinsip satu transaksi adalah atas fakta pembunuhan kedua dilakukan hasil kemarahan tanpa belas kasihan. Responden telah kembali untuk membunuh simati kedua selepas telah membunuh simati pertama.

(3) Hukuman berturutan adalah perlu untuk tidak menggalakkan jenayah kekerasan yang akan menjejaskan tubuh manusia sehingga menyebabkan kematian kerana kepentingan awam

adalah sangat penting. Jika yang arif hakim telah mempertimbangkan dengan sepenuhnya keadaan-keadaan dan fakta-fakta kes, beliau akan membuat perintah supaya kedua-dua hukuman itu dijalankan berturutan. Yang arif hakim telah khilaf kerana tidak menggunakan pengecualian kepada rukun satu transaksi dan prinsip keseluruhan di dalam kes ini. Oleh itu, kedua-dua hukuman diarahkan untuk berjalan berturut-turut.

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
PP v. Karthiselvam Vengatan [2009] 4 CLJ 632 CA ***(refd)***
PP v. Prabu Veeramuthu & Ors [2010] 8 CLJ 257 CA ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(refd)***
R v. Skinner [1986] 8 Cr App R (S) 166 ***(refd)***
R v. Wheatley [1983] 5 Cr App R 417 ***(refd)***
Sau Soo Kim v. PP [1975] 1 LNS 158 FC ***(refd)***
Yit Kean Hong v. PP [2005] 4 CLJ 592 CA ***(refd)***

Legislation referred to:
Penal Code, ss. 302, 304(a)

For the appellant - Hanim Mohd Rashid DPP
For the respondent - Ayasamy Velu (Remuka Krshnasamy with him); M/s V Samy & Co

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-172-2008]

Reported by Suhainah Wahiduddin

JUDGMENT

Hasan Lah JCA:

[1] The respondent was originally charged for two offences under s. 302 of the Penal Code. The learned deputy public prosecutor then tendered alternative charges under s. 304(a) of the Penal Code. The respondent pleaded guilty to the alternative charges. After hearing the mitigation put forward by the respondent's counsel the learned judge sentenced the respondent to sixteen years' imprisonment for each offence to take effect from the date of his arrest. In other words, the two sentences of imprisonment were ordered to run concurrently.

[2] The appeal by the Public Prosecutor in this case is in respect of the sentence only.

[3] The facts of the case were presented by the prosecution in the proceeding in the trial court and it was marked as exh. P5. Briefly, the facts are these. The two deceaseds, Lim Teik Tsung and Ong Kian Meng, went to the V Bar Bistro and Lounge at nos. 43, 45 and 46, Jalan Nilam 5 in Bandar Bukit Tinggi, Klang on 26 November 2006 at about 11.30pm. They sat at a table inside the bistro and ordered beverages. At about 11.45pm, three Chinese men, namely Casius Lee Wai Hoong, Chua Kee Yong and Nai Boon Wah (the respondent), entered the bistro. They sat at a table situated in a corner of the bistro and ordered beer and some food.

[4] By 1.30am (on 27 November 2006) the only customers left in the bistro were the two deceaseds and the three Chinese men. Two of the bistro's employees, Mohd Yassin and Ram Munna, were at the bar counter. Both the employees then heard the sound of glasses breaking and they saw the respondent and Casius Lee Wai Hoong charging towards the deceaseds' table. A verbal argument then started between the respondent and Casius Lee Wai Hoong and the two deceaseds. The respondent took out a knife, which was strapped to his leg, and started to attack the two deceaseds with the knife.

[5] The first deceased, Lim Teik Tsung, attempted to escape by running towards the bistro's entrance door but the respondent chased after him and stabbed him repeatedly near the entrance door. The first deceased collapsed after he was attacked by the respondent and he died while on the way to the hospital.

[6] The second deceased, Ong Kian Meng, did not retaliate upon being attacked by the respondent. After the respondent stabbed the second deceased, the second deceased collapsed at the table where he was sitting. The whole incident was recorded in the bistro's CCTV. After the attacks the respondent and his two friends fled from the scene of the crime. The respondent was arrested on 6 June 2008.

[7] The post mortem report for the first deceased shows that the cause of his death was multiple stab injuries to his chest, abdomen and neck. He also sustained lacerations on his head region and left wrist. The post mortem report for the second deceased shows that the cause of his death was two stab wounds to his chest. The stab wounds had punctured his lungs causing him to lose a lot of blood. Apart from that the second deceased also sustained lacerations to his head, neck and face.

[8] The only issue before us is whether the two terms of imprisonment should be made to run consecutively. The learned deputy public prosecutor submitted that based on the facts and the circumstances of this case they should be ordered to run consecutively. In support of that the learned deputy public prosecutor cited the following cases:

(a) *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572;

(b) *PP v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645;

(c) *PP v. Prabu Veeramuthu & Ors* [2010] 8 CLJ 257;

(d) *Yit Kean Hong v. PP* [2005] 4 CLJ 592.

[9] In his judgment the learned judge said:

> The accused is saved by the fact that his offence was committed prior to the amendment to Section 304(a) of the Penal Code thus the maximum sentence available to be imposed is 20 years imprisonment. The court has considered the facts that the plea of guilt was made expeditiously and that the accused does not have any prior conviction. Nonetheless, the court finds that the actions of the accused in causing the death of the two victims are vicious and heinous especially since the attack on the victims was unprovoked. The court finds that a discount in the sentence should not operate automatically by reason of his guilty plea. The court finds that the accused should be imposed with a heavier sentence to mirror the brutality of the injuries inflicted on the two victims. In light of the above facts, this court finds that the most appropriate sentence is 16 years imprisonment from the date of arrest for the first charge and 16 years imprisonment from the date of arrest for the second charge.

[10] With regard to the order that the two terms of imprisonment are to run concurrently, the learned judge, after referring to the decision of this court in *Bachik bin Abdul Rahman*, said:

> The utmost consideration was given to the fact that the court finds that the accused has a high probability of rehabilitation in light of the absence of any prior convictions against him and that his plea of guilty was made expeditiously. Furthermore, the facts of the case show that the two acts of culpable homicide were committed within the same and immediate time period and place and there was continuity in action and design. In other words, there is no demarcation between the culpable homicide of the first

and second victims. Based on these reasons, the court had ordered for the sentences as aforesaid in the opening passage of this judgment.

[11] It is trite law that what sentence to be imposed in a given case is a matter of discretion for the sentencing court. An appellate court should not therefore intervene unless the court below has erred in principle, that is to say, it took into account irrelevant considerations or failed to take into account relevant considerations or passed a sentence that is manifestly inadequate or not permitted by law (see *PP v. Karthiselvam Vengatan* [2009] 4 CLJ 632; *Yit Kean Hong v. PP (supra)*).

[12] The principles governing the imposition of concurrent or consecutive sentences have been succinctly stated by this court in Bachik Abdul Rahman where at p. 579 Augustine Paul JCA (as he then was) said:

> ... In deciding whether the terms of imprisonment should be consecutive or commence at another date the court will be guided by the one transaction rule and the totality principle. Pursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive (see *R v. Saleem* [1964] Crim LR 482; *R v. Walsh* [1965] Crim LR 248). For there to be one transaction four elements must be present, that is to say, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v. PP* [1979] 2 MLJ 88; *Amrita Lal Hazra v. Emperor* 42 Cal 957; *Chin Choy v. PP* [1955] MLJ 236). The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v. PP* [1992] 1 SLR 81 at p. 83:
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> > The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v. Faulkner* [1972] 56 Cr App R 594, *R v. Wheatley* [1983] 5 Cr App R (S) 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

[13] The decision in Bachik Abdul Rahman was followed in Yit Kean Hong where Nik Hashim JCA (as he then was) at p. 603 observed:

> It appears from *Bachik*'s case that the Court of Appeal, in upholding the consecutive term of imprisonment imposed by the Sessions Court, had applied the exception to the one transaction rule and the totality principle in that it took the facts of the case and the circumstances of the offence into consideration in reviewing the sentences. The offences committed by the accused in that case were of the same severity and unrelated and therefore deserving a deterrent sentence.
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> Similarly, in the present case, the two offences committed by the appellant were very serious indeed each punishable with imprisonment of up to 20 years. Like the case of Yap Huat Heng, supra, the present case also involved two distinct offences and two different victims. On the facts, the second charge of attempted murder was not really subsidiary to the first charge of culpable homicide, although the two offences were committed in the course of a single transaction. The victims suffered two different types of injuries and the methods of inflicting them on the two victims were also different from each other. Even learned counsel for the appellant conceded before us that the facts against the appellant were bad.

[14] In *Prabu Veeramuthu & Ors* this court at p. 266 had this to say:

> The Court of Appeal in *Bachik*'s case and *Yit Kean Hong*'s case had clearly applied the exception to the one transaction rule and the totality principle in that it took the facts of the case and the circumstances of the offence into consideration in reviewing the sentences. Like the facts in *Yit Kean Hong*'s case the two offences committed by the three respondents in the present case were very serious indeed punishable with imprisonment of up to 20 years. This case involved two separate and distinct offences and two different victims. The injuries inflicted on the victims in the present case, as rightly stated by the learned trial judge, were vicious and would call for an outright condemnation. There was never any provocation by the hapless victims. In our view this is a proper case for the court to apply the exception to the one transaction rule. In addition, a consecutive sentence is necessary to discourage others from committing violent crimes affecting the human body resulting in death.

[15] In *Sau Soo Kim v. PP* [1975] 1 LNS 158 Lee Hun Hoe CJ (Borneo) said that the question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. The one transaction rule is not absolute as there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished (see *R v. Wheatley* [1983] 5 Cr App R 417 and *R v. Skinner* [1986] 8 Cr App R (S) 166).

[16] Reverting to the facts in the instant case, the two offences committed by the respondent were very serious as the respondent had caused serious injuries to both victims with a knife which resulted in their deaths. The post mortem report (exh. P7) shows that the first victim sustained ten stab wounds to the chest, abdomen and neck. He also had incised wounds at left side of his head, that also cut his left ear, vertex and left wrist. Both of his lungs were partially collapsed with the middle lobe of right lung was punctured and the lower lobe of left lung was incised. His stomach was punctured and there were several punctured marks to his diaphragm. His liver was also cut and the lower half of 8th right ribs and upper margin of left 7th ribs were also cut.

[17] The facts show that it was the respondent who acted aggressively and when he went into the bistro he already had a knife with him. The first deceased was not armed. In fact the first deceased was viciously attacked by the respondent while he was trying to escape. The respondent pursued after him and stabbed him at the entrance door of the bistro. The facts show that the respondent was not in any danger as there was no retaliation from the first deceased. In fact the first deceased was helpless and was not able to put up any defence to the vicious repeated stabs with the knife by the respondent.

[18] With regard to the second deceased, the post mortem report (exh. P8) shows that he sustained two stab injuries over back of his left chest. One stab was fatal as it also injured his lungs causing him to loose a lot of blood. He also had incised wounds at the back of his head, and left side of his neck and face. The second deceased was helpless and was not able to put up any defence to the respondent's vicious attack with a knife. The facts show that there was no provocation or retaliation by the second deceased. The second deceased died almost instantaneously at the scene of the crime.

[19] The learned judge's reasons for ordering the two terms of imprisonment to run concurrently are that the respondent did not have previous conviction, he pleaded guilty to the alternative charges and more importantly the two offences were committed in the course of a single transaction. In his judgment the learned judge accepted as a fact that the attack by the respondent was vicious and the respondent had attacked the deceaseds without any provocation.

[20] As decided in *Sau Soo Kim* the question whether the sentences should run consecutively or concurrently must depend upon the particular circumstances of the case. On the facts and circumstances of this case and in line with the decisions of this court in *Bachik Abdul Rahman*, *Yit Kean Hong* and *Prabu Veeramuthu* we are of the view that this is a proper case for the court to apply the exception to the one transaction rule and the totality principle in deciding to order the two terms of imprisonment to run consecutively. In addition, the two offences committed by the respondent were very serious and each punishable with imprisonment of up to 20 years. This case also involved two separate and distinct offences and two different victims. In this case too a matter which attracted the application of the exception to the one transaction principle was the fact that the second killing resulted from merciless anger. The facts show that the respondent came back to finish off the second deceased after having dealt with the first deceased at the entrance of the bistro. The second deceased was still at the table where he had originally sat offering no resistance when the respondent stabbed him to death. We are further of the view that consecutive sentences are necessary in order to discourage violent crime affecting the human body resulting in death as public interest is paramount. Had the learned judge given adequate consideration to the circumstances and facts of this case and the authorities referred to earlier he would have, in our view, ordered that the two sentences to run consecutively. It is our judgment that the learned judge had erred in not applying the exception to the one transaction rule and the totality principle to this case.

[21] For the reasons given, we had no alternative but to intervene and order that the two sentences to run consecutively. The appeal was therefore allowed.